A

Public Prosecutor v Ahmad Shukri bin Othman

B

HIGH COURT (IPOH) — CRIMINAL APPEAL NO M2 42S-3–01 OF 2013
NOORIN BADARUDDIN JC
5 SEPTEMBER 2014

C

Criminal Procedure — Trial — Whether decision of trial court against weight of evidence — Senior navy officer acquitted of charges of using false invoices to claim for monies spent on buying rations — Senior navy officer acquitted of charges of using false invoices to claim for monies spent on buying rations — Whether lower court's finding accused did not have mens rea to commit offences erroneous — Whether evidence did not show accused's superior officer instructed him to create and use false invoices

D

The respondent, a lieutenant-commander with the Royal Malaysian Navy, was acquitted and discharged by the sessions court on two charges of dishonestly using forged invoices ('the invoices') to claim payment on purchase of rations for a navy vessel deployed on a peace-keeping mission to Timor Leste in June and August of 2006. The Government of Malaysia paid the claims on the invoices. At the trial, three prosecution witnesses, SP1, SP2 and SP4, who were officers under the respondent's supervision at the material time, testified that after they had prepared the invoices as instructed by the respondent, he signed them to affirm he had checked and received the supplies stated therein and the invoices were stamped with a stamp bearing the name of Landmark Trading, a supermarket in Timor Leste. Landmark Trading's operational manager, SP7, however, testified that the invoices were not issued by his company; nor were the signatures on them the company's. SP7 said Landmark Trading issued its own invoices when the rations were delivered to the respondent. This was diametrically opposed to the respondent's contention that he could not obtain invoices from the company because of the turbulent situation in Timor Leste at the time. The respondent contended that he never intended to use the invoices fraudulently or dishonestly as he was merely carrying out the instructions of his superior officer, namely, the vessel's commanding officer, SP3. In his testimony, SP3 vehemently denied he had instructed the respondent to prepare the invoices. On finding that the prosecution had made out a prima facie case, the trial court called for the respondent's defence but after hearing the defence's case, the court ruled the respondent did not have the mens rea to commit the offences as he was obliged to follow SP3's instructions. The instant appeal was against the trial court's decision.

E

F

G

H

I

Held, allowing the appeal, setting aside the decision of the trial court, finding

the respondent guilty on both charges and sentencing him to one year jail on each charge:

(1) The trial court's decision went against the weight of the evidence and was based on erroneous beliefs, probabilities, impressions and assumptions. The trial judge took a 360-degree turn after accepting SP3's evidence at the close of the prosecution's case by disbelieving his evidence after hearing the evidence of the respondent and SD2 at the defence stage, although SP3 had denied he had given any instructions to the respondent to create and use the forged invoices (see paras 45–44 & 50).

(2) The respondent did not at all deny that he had used the forged documents as genuine; that he had instructed SP1 and SP2 to create the invoices and make the stamp bearing the name of Landmark Trading and that the invoices were later approved and paid for by the Government of Malaysia. All these pieces of evidence proved that the approval of the invoices was obtained dishonestly by the respondent. He had both the motive and intention to do the acts in question. There was not an iota of evidence to show the respondent was unaware or did not know that he used forged documents to make the claims (see paras 25, 27 & 29).

(3) SP7 testified that Landmark Trading issued invoices when the deliveries were made and the purchases were paid for by the respondent. Why then did the respondent not use the company's invoices but instead chose to use the false invoices? The respondent took advantage of the situation in Timor Leste to justify his action. The situation there might not have been peaceful but from SP7's evidence, it was not to the extent that invoices could not be requested for and obtained. This aspect of SP7's evidence was unchallenged and went unappreciated by the trial judge. Furthermore, SP8 testified that if actual invoices were not obtainable because of the emergency situation in Timor Leste, all the respondent had to do was put up a memo affirmed by the commanding officer or send a telex to base explaining why invoices could not be obtained, but this was also not done (see paras 30 and 31).

(4) Throughout the prosecution's case, there was no evidence to show SP3 gave the respondent any orders to create and use the false invoices. The trial judge misdirected herself in holding that the respondent did not have the intention to deceive in this case as he was obliged to follow SP3's orders. Even if the defence's version was true in that the respondent had discussed the matter with SP3, it could not be accepted that the respondent was under a mistake of fact or under duress to follow SP3's orders. He could have disregarded the orders as there were other legitimate methods or alternatives to justify the purchases (see paras 37–38, 42 & 52).

(5) The respondent could not be said to have had no mens rea when he obviously took a very active part in instructing SP1, SP2 and SP4 to prepare the forged invoices and to have the forged Landmark Trading stamp made. He signed the forged invoices and submitted them to the relevant authority. The respondent's defence in putting the blame on SP3 failed to cast any reasonable doubt on the prosecution's case. Also, the fact that there was no misappropriation of the allocation given to the respondent was irrelevant to the offences in question as misappropriation was not an element of the offence under s 471 of the Penal Code. The offence was for using a false document as genuine and not misappropriation (see paras 33–34, 56 & 59).

[Bahasa Malaysia summary

Responden, seorang leftenan komander Tentera Laut Malaysia, telah dibebaskan dan dilepaskan oleh mahkamah sesyen terhadap dua pertuduhan secara tidak amanah menggunakan invois yang dipalsukan ('invois') untuk menuntut bayaran untuk pembelian catuan untuk sebuah kapal tentera laut yang digunakan dalam misi pengaman ke Timor Leste pada bulan Jun dan Ogos 2006. Kerajaan Malaysia membayar tuntutan untuk invois-invois tersebut. Sewaktu perbicaraan, tiga saksi pendakwaan, SP1, SP2 dan SP4, yang merupakan pegawai di bawah penyeliaan responden pada masa material, memberi keterangan bahawa selepas mereka menyediakan invois-invois seperti yang diarahkan oleh responden, dia menandatanganinya untuk mengesahkan bahawa dia telah memeriksa dan menerima bekalan yang tertulis di dalamnya dan invois-invois telah dicap dengan cap yang mengandungi nama Landmark Trading, sebuah pasar raya di Timor Leste. Pengurus operasi Landmark Trading, SP7, bagaimanapun, memberi keterangan bahawa invois tidak dikeluarkan oleh syarikatnya; tidak juga tandatangan kepunyaan syarikat mereka. SP7 menyatakan Landamark Trading mengeluarkan invoisnya sendiri apabila catuan dihantar kepada responden. Ini bertentangan dengan hujahan pihak responden bahawa dia tidak boleh mendapatkan invois dari syarikat itu kerana keadaan gelora di Timor Leste pada masa itu. Responden berhujah bahawa dia tidak pernah berniat untuk menggunakan invois-invois itu secara fraud atau tidak amanah kerana dia hanya menjalankan arahan pegawai atasannya, iaitu, pegawai pemerintah vesel, SP3. Dalam testimoninya, SP3 menafikan sekeras-kerasnya dia telah memerintahkan responden untuk menyediakan invois. Dapatan fakta mendapati pihak pendakwaan telah membuktikan kes prima facie, mahkamah perbicaraan memanggil responden untuk pembelaan tetapi selepas mendengar kes pembelaan, mahkamah memutuskan responden tidak mempunyai mens rea melakukan kesalahan kerana dia perlu mengikuti arahan SP3. Rayuan ini adalah terhadap keputusan mahkamah perbicaraan.

Diputuskan, membenarkan rayuan, mengetepikan keputusan mahkamah perbicaraan, mendapati responden bersalah atas kedua-dua pertuduhan dan

menghukum setahun penjara atas setiap pertuduhan:

(1) Keputusan mahkamah perbicaraan itu bertentangan dengan berat bukti dan adalah berdasarkan kepada kepercayaan salah, kebarangkalian, tanggapan dan andaian. Hakim perbicaraan membuat pusingan 360 darjah selepas menerima keterangan SP3 di akhir kes pendakwaan dengan tidak mempercayai keterangannya setelah mendengar keterangan responden dan SD2 pada peringkat pembelaan, walaupun SP3 telah menafikan dia telah memberikan apa-apa arahan kepada responden untuk membuat dan menggunakan invois palsu (lihat perenggan 45–44 & 50).

(2) Responden tidak langsung menafikan yang dia telah memalsukan dokumen sebagai tulen; bahawa dia telah mengarahkan SP1 dan SP2 untuk mereka invois dan membuat cap bertanda Landmark Trading dan bahawa invois kemudiannya diluluskan dan dibayar oleh Kerajaan Malaysia. Semua keterangan-keterangan membuktikan bahawa kelulusan diperolehi secara tidak amanah oleh responden. Dia mempunyai kedua-dua motif dan niat untuk melakukan tindakan yang dipersoalkan. Tiada sedikitpun keterangan untuk menunjukkan responden tidak menyedari atau tidak mengetahui bahawa dia telah menggunakan dokumen palsu untuk membuat tuntutan (lihat perenggan 25, 27 & 29).

(3) SP7 memberi keterangan bahawa Landmark Trading mengeluarkan invois apabila penghantaran dibuat dan pembayaran dibayar oleh reponden. Mengapa responden tidak menggunakan invois syarikat tetapi sebaliknya memilih untuk menggunakan invois palsu? Responden mengambil kesempatan pada situasi di Timor Leste untuk menjustifikasikan tindakannya. Situasi di sana mungkin tidak aman tetapi daripada keterangan SP7, ia bukanlah sehingga invois tidak boleh diminta dan diperolehi. Aspek keterangan SP7 itu tidak dicabar dan tidak dinilai oleh hakim perbicaraan. Tambahan lagi, SP8 memberi keterangan bahawa jika invois sebenar tidak boleh diperolehi kerana keadaan darurat di Timor Leste, apa yang responden perlu lakukan adalah untuk meletakkan memo yang disahkan oleh pegawai pemerintah atau menghantar melalui teleks ke pangkalan menerangkan mengapa invois tidak boleh diperolehi, tetapi ini juga tidak dilakukan (lihat perenggan 30 & 31).

(4) Sepanjang kes pendakwaan, tiada keterangan untuk menunjukkan SP3 memberikan responden apa-apa arahan untuk mereka dan menggunakan invois palsu. Hakim perbicaraan tersalah arah dirinya dalam memutuskan bahawa responden tidak mempunyai niat untuk menipu dalam kes ini tetapi dia perlu menurut arahan SP3. Jikapun versi pembelaan adalah benar bahawa responden telah membincangkan perkara itu dengan SP3, ia tidak dapat diterima bahawa responden

berada di bawah satu kesilapan fakta atau dalam keadaan terpaksa untuk mengikuti arahan SP3. Dia boleh mengabaikan arahan kerana terdapat cara atau alternatif lain yang sah untuk mewajarkan pembelian (lihat perenggan 37–38, 42 & 52).

(5) Responden tidak boleh dikatakan tidak mempunyai mens rea apabila dia mengambil bahagian secara aktif dalam mengarahkan SP1, SP2 dan SP4 untuk menyediakan invois palsu dan untuk memalsukan cap Landmark Trading. Dia telah menandatangani invois palsu dan menghantar mereka ke pihak berkuasa relevan. Pembelaan responden dalam menyalahkan SP3 gagal untuk gagal menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan. Juga, hakikat bahawa tidak ada penyelewengan peruntukan yang diberikan kepada responden adalah tidak relevan kepada kesalahan yang dipersoalkan kerana penyelewengan bukan unsur kesalahan di bawah s 471 Kanun Keseksaan. Kesalahan adalah untuk penggunaan dokumen palsu sebagai yang tulen dan bukan penyelewengan (lihat perenggan 33–34, 56 & 59).]]

Notes

For cases on trial in general, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5258-5876.

Cases referred to

Chan Chwen Kong v PP [1962] MLJ 307, CA (refd)
Lim Boon San v PP [1968] 2 MLJ 45 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Ho Sek Kong [2006] 2 MLJ 81, HC (refd)

Legislation referred to

Penal Code ss 465, 471

Wong Poi Yoke (Deputy Public Prosecutor Attorney Generals' Chambers) for the appellant.
Norhasham bin Hj Hassan (Norhasham & Assoc) for the respondent.

Noorin Badaruddin JC:

[1] The respondent was charged with two counts of dishonestly using as genuine documents which he knew to be forged, an offence under s 471 of the Penal Code and punishable under s 465 of the same code. The charges are as follows:

61-14-2011

Bahawa kamu di sekitar Jun dalam tahun 2006, sebagai Pegawai Bekalan di Kapal KD Mahawangsa, Tentera Laut DiRaja Malaysia di atas Kapal KD Mahawangsa,

dengan curangnya telah menggunakan suatu dokumen sebagai tulen iaitu Invois Landmark Trading PTE LTD bernombor GB 67854 bernilai USD46,813 bertarikh 03 June 2006 untuk tuntutan pembelian rangsum segar yang mana kamu mempunyai sebab untuk mempercayai bahawa dokumen Landmark Trading PTE LTD bernombor GB 67854 adalah palsu dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 471 Kanun Keseksaan yang boleh dihukum di bawah Seksyen 465 Kanun yang sama.

61-15-2011

Bahawa kamu di sekitar Ogos dalam tahun 2006, sebagai Pegawai Bekalan di Kapal KD Mahawangsa, Tentera Laut DiRaja Malaysia di atas Kapal KD Mahawangsa, dengan curangnya telah menggunakan suatu dokumen sebagai tulen iaitu Invois Landmark Trading PTE LTD bernombor GB67923 bernilai USD16,864.74 bertarikh 26 Ogos 2006 untuk tuntutan pembelian rangsum segar yang mana kamu mempunyai sebab untuk mempercayai bahawa dokumen Landmark Trading PTE LTD bernombor GB 67923 adalah palsu dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 471 Kanun Keseksaan yang boleh dihukum di bawah Seksyen 465 Kanun yang sama.

[2] The learned sessions court judge ('the trial judge') after hearing nine prosecution witnesses, ordered the respondent to enter his defence at the close of the prosecution's case.

[3] After considering the defence and re-evaluating the whole evidence during the trial, the trial judge stated that she came to the inevitable conclusion that the respondent had successfully raised a reasonable doubt in the prosecution's case. The respondent was acquitted and discharged for both charges preferred against him. This is the prosecution's appeal against the said acquittal.

THE FACTS OF THE CASE/PROSECUTION'S CASE

[4] The learned trial judge had succinctly stated the brief facts of the case at pp 9–12 of her written judgment.

[5] Briefly, the respondent was a lieutenant commander serving the Royal Malaysian Navy and was assigned as a supply officer with the vessel KD Mahawangsa during the material time stated in the charges. The said KD Mahawangsa was deployed to set sail to Timor Leste as part of the Malaysian peacekeeping mission pursuant to the United Nations Security Council Resolution in establishing an integrated mission to bring peace and stability to the said country.

[6] The commanding officer of the ship was SP3 who was assisted by SD2. The respondent was tasked to ensure the food rations and supply were available

and sufficient for the consumption of the crew and troops on board the vessel throughout the journey to Timor Leste and back to Malaysia. KD Mahawangsa did two trips (in June and August 2006) of return leg to Timor Leste and back to Malaysia.

[7] SP1, SP2 and SP4 were officers working under the supervision of the respondent during the material time. They testified that during the material time, they were instructed by the respondent to prepare documentations of claim for the purchase of food rations and supply for both the trips KD Mahawangsa did to Timor Leste.

[8] The above mentioned documentations were prepared on the said vessel. SP1, SP2 and SP4 testified that the documentations in the form of P2D and P4D ('the invoices') were prepared pursuant to the order given by the respondent. It was without doubt and challenge that both the documents were not genuine.

[9] SP2 specifically stated that he was instructed by the respondent to create the invoices on a laptop supplied by the respondent. After the respondent was satisfied with the creation of the invoices SP2 had printed the documents on pieces of papers and handed them to the respondent. All these were done while they were in Surabaya, Indonesia. The stamp of one Landmark Trading ('P3'), a supermarket in Timor Leste was affixed to the documents. The stamp ('P3') with the name of the said supermarket was also made in Surabaya, Indonesia again, on the specific instructions of the respondent.

[10] SP1 corroborated the evidence of SP2 whereby SP1 testified as to his involvement in creating both the invoices on the instructions of the respondent. According to SP1, he did several amendments to the invoices until the respondent was satisfied with them. The respondent then signed both the documents affirming that he had checked and received the supply stated in both the invoices. His evidence revealed further that the stamp bearing the name of Landmark Trading ie P3 was handed to him by the respondent while they were on board.

[11] Exhibit P2A which is related to P2D shows that a sum of RM173,208.10 was approved by the government for the purchase of food and rations for the first trip in June 2006 whilst exh P4A which is related to P4D showed the sum of RM62,399.53 approved by the government for the same purpose mentioned earlier for the second trip in August 2006.

[12] SP7, the operational manager of Landmark Trading in Timor Leste testified and confirmed that both the invoices in P2D and P4D were not issued

by Landmark Trading. SP7 further stated that the signatures on both the invoices were not authorised signatures of the company.

[13] It is pertinent to note that the testimonies of SP1, SP2 and SP7 on the forged documents were not challenged by the respondent during cross-examination.

[14] SP3, the commanding officer of the KD Mahawangsa testified that he was never informed by the respondent that there were no invoices obtained for the purchase of the food supply in Timor Leste. SP3 denied that he gave instructions to the respondent to create or prepare the forged invoices.

[15] SP5 was the salary staff attached at the Armada Base in Lumut. She was responsible for all the claim allowances of officers at the base. SP5 confirmed that based on P2D and P4D, the claims by the KD Mahawangsa for food supplies were approved by the Government of Malaysia. The approval can be seen from the payment vouchers, ie P2A and P4A.

[16] Based on the above facts and evidence of SP1, SP2, SP3, SP5 and SP7 as well as exhs P2A-L and P4A-L, this court finds that the learned trial judge did not err in calling the respondent to enter his defence. Based on the maximum evaluation of the whole evidence produced by the prosecution, this court agreed with the learned trial judge that a prima facie case had been established against the respondent at the close of the prosecution's case.

[17] This court is satisfied that the prosecution had proved:

(a) invoices P2D and P4 dare forged documents;

(b) respondent knew the invoices were forged;

(c) respondent had used the invoices as genuine;

(d) respondent knew or had reason to believe that the invoices were forged; and

(e) respondent had used those invoices dishonestly or fraudulently.

THE DEFENCE

[18] It is pertinent to note that the respondent did not deny or challenge the fact that he did instruct SP1 and SP2 to create the forged invoices. The respondent admitted that he knew both invoices P2D and P4D were created by SP1, SP2 and SP4 and that he had used the invoices to make the claims for the purchase of food supply in Timor Leste.

[19] Nonetheless, the respondent denied that he used the forged invoices fraudulently or dishonestly. The respondent in his defence had put the blame on SP3, the commanding officer during the material time. The respondent stated that what he did was pursuant to the order and instructions given by SP3.

[20] SD2 and SD3 were called to support the defence of the respondent. SD2 testified that it was SP3 who had given the instructions to the respondent to justify the purchase of the food supply without receipts or invoices whilst SD3 stated that from his experience the usage of receipts from other sources were done before to justify purchases made.

[21] The learned trial judge accepted the defence story and ruled that the respondent succeeded in raising reasonable doubt as to the prosecution's case. The learned trial judge was convinced that the mens rea or criminal intent on the part of the respondent was absent when he used P2D and P4D as genuine.

[22] However, this court disagreed with the findings and ruling made by the learned trial judge at the conclusion of the defence case. This court is of the view that the respondent had failed to cast any reasonable doubt on the prosecution's case after a maximum evaluation had been done on the evidence produced by the prosecution. This court found that the learned trial judge had erred in appreciating the defence version by concluding that there was no dishonest intention on the part of the respondent. This court found that the learned trial judge had acted against the weight of evidence produced.

[23] This court is always reminded that the burden of proving the case beyond reasonable doubt is on the prosecution. But when a prima facie case is established, the respondent has an evidential burden on balance of probabilities to cast doubt on the prosecution's case. In the case of *Public Prosecutor v Ho Sek Kong* [2006] 2 MLJ 81, the court stated:

> Although the burden of proof in a criminal trial lies throughout on the prosecution in bringing home a conclusion that it has proven its case beyond a reasonable doubt, the accused if called upon to enter his defence bears the evidential burden of casting that doubt.

[24] The Court of Appeal in the case of *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307 also states:

> In most criminal cases, there is at some stage an onus of a sort upon the accused person. Once the prosecution produces evidence which if believed would support a conviction there is tactical onus on the accused person either to produce evidence on his own or to point to something in the prosecution's evidence that at the very lowest make the trier of fact less than sure of any conclusions he might otherwise be

prepared to base upon the prosecution evidence. If he fails to discharge that tactical onus he will be convicted. That is very true.

[25] It is pertinent to repeat that from the facts and evidence produced, there was no denial at all on the part of the respondent that he had used the forged documents as genuine. He never denied that it was he who had instructed SP1 and SP2 to create the invoices. He took all the trouble to get the forged stamp done in Surabaya Indonesia. This court found that his dishonesty can be deduced by this unlawful act of his which was executed unlawfully.

[26] Dishonest intention is further explained in *Ratanlal & Dhirajlal's Law of Crimes, (26th Ed)*:

> The word 'dishonest' is used as bearing relation to property. The intention under the section must be to cause wrongful gain or wrongful loss to a person ...
>
> A dishonest intention may be presumed only if an unlawful act is done or if a lawful act is done by unlawful means ...
>
> An actual intention to convert an illegal or doubtful claim into an apparently legal one makes an action dishonest

[27] SP1 testified that he prepared P2D and P4D upon the instruction by the respondent and the respondent signed the invoices once he was satisfied with them. SP2 and SP4 further received instructions from the respondent to assist SP1 in preparing P2D and P4D. The respondent also instructed SP2 to make the stamp bearing the name of Landmark Trading. The invoices were later approved and paid by the Government of Malaysia as stated in P2A and P4A. These evidence proved that the approval was obtained dishonestly by the respondent.

[28] *Ratanlal & Dhirajlal's on Law of Crimes, (26th Ed) at p 87* explained:

> The law takes into account the primary or immediate intention and not the secondary mediate or remote. As every man is presumed to intend consequence of his act, it is from the consequences that the court has often presumed the intention of the accused in doing a particular act. The law does not look for motive: it looks only to the intention. Motive and intention are two different things. Motive is directed ultimate and, good or bad, which person hopes to secure, his intention is concerned with the immediate effects of his acts.

[29] By evaluating the whole evidence in this case, it will not be an exaggeration that the respondent had both the motive and intention. The respondent knew he could not justify the claim as he could not produce any receipts or invoices of the purchases he did. He was left with no choice but to create or invent the claims. He took all the trouble to instruct his officers to create the invoices. He signed them and used them as genuine to make the

necessary claims. The claims were approved and the payment was executed by the government. There is not an iota of evidence or defence that the respondent was unaware or did not have the knowledge that he had used forged documents to make the claims. It cannot be gainsaid that he had no dishonest intention to use the invoices.

[30] To strengthen the findings above mentioned, SP7 explained at p 103 of the appeal record that Landmark Trading issued invoices after the delivery and upon the officers checking the goods supplied. SP7 could remember that during the material time there were two Malaysian vessels in Timor Leste dealing with Landmark Trading. One is Mahawangsa and the other was Inderasakti. SP7 confirmed that the respondent paid the purchases he made with cash in US Dollars at Landmark Trading office. Why didn't the respondent asked for the receipts or invoices when he made the cash payment at the Landmark Trading office? It is safe for this court to infer from SP7's evidence, the invoices were issued but instead the respondent chose to use P2D and P4D. It is not difficult to gather and infer that the respondent took advantage of the situation in Timor Leste to justify his action later to use forged invoices instead. The situation in Timor Leste may not be peaceful, but from the evidence of SP7, it could be gleaned that it did not come to the extent invoices could not be requested and obtained. Further, SP7 did say that invoices were issued. Again, this aspect of SP7's evidence was not challenged at all. This would amount to a tacit acceptance of the testimony of SP7. This court agreed with the submission of the learned DPP that the learned trial judge had failed to appreciate SP7's evidence which was in contrast with the defence forwarded by the respondent that he could not obtain the invoices from Landmark Trading due to the situation in Timor Leste at the material time.

[31] One other crucial part of the evidence produced by the prosecution was through SP8. SP8 had testified that there were methods where purchases without invoices could be justified. The methods prescribed were not cumbersome. All the officer has to do was to put up a memo affirmed by the commanding officer or to send a telex to the base explaining the reasons why the invoices could not be obtained. If the emergency situation in Timor Leste had truly hindered the process of obtaining the invoices (as what the respondent had stated in his defence), why did he not state as such in a memo or the telex? Why must the respondent opted to use forged invoices when a simple method can be resorted to and an honest justification be made? One could only answer these questions that the respondent had the dishonest intention all the while to use forged documents instead.

[32] Therefore this court found that the defence forwarded by the respondent could not be said to have raised reasonable doubt on the prosecution's case.

[33] The appellant/prosecution also stated that the learned trial judge had erred in fact and in law in making a finding that the evidence of SP3 significantly confirmed that there was no misappropriation of the allocation given to the respondent. Therefore, the learned trial judge found that it could not be said that there was dishonest intention on the part of the respondent.

[34] This court agreed with the submission by the learned DPP that misappropriation is not an element for the offence under s 471 of the Penal Code. Section 471 prescribes offence of using a document as genuine and not misappropriation. Misappropriation is irrelevant as far as s 471 of the Penal Code is concerned. This is where the learned trial judge had erred again.

[35] The respondent in his defence had put the blame on SP3, his commanding officer during the material time. The respondent's defence inter alia stated that he was acting based on his superior order. This court examined the cross-examination of SP3. Suggestions were put up by learned defence counsel that during the briefing given to SP3, the respondent informed SP3 and gave alternatives on how to justify the claims of the purchases of the food supply. SP3 had stated that he was not aware of it. SP3 further denied that the respondent suggested to refer the problem to the higher management. SP3 denied to the suggestions made that it was he who had instructed the respondent to use receipts from other means to make the claims. SP3 further denied that he had instructed his assistance to use other receipts which resulted the respondent to ask his officers to get the stamp of Landmark Trading in Surabaya, Indonesia. SP3 affirmed that he had no knowledge of these facts.

[36] In the case of *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, Augustine Paul J stated:

> Mere suggestions by a pleader or advocate for the accused do not amount to evidence by the fact suggested, unless they are either partly or wholly accepted of the witness for the prosecution.

[37] Firstly, throughout the prosecution's stage, there was no evidence to show that SP3 did give the orders. The learned trial judge had accepted SP3's testimony. The learned trial judge had evaluated all the evidence produced during the prosecution's case on a maximum evaluation, otherwise defence would not have been called.

[38] Secondly, the learned trial judge had erred when she made the finding of absence of intention to deceive as the respondent was obliged to follow his superior's order ie SP3. Obedience to an unlawful superior order is not a complete defence. For the learned trial judge to accept it as a defence that raised reasonable doubt as to the respondent's criminal intention in this case, tantamount to a misdirection. Further, to the suggestions put by the defence, SP3 had repeatedly denied that he gave such orders.

[39] *Halsbury's on Laws of Malaysia* at para (109.028) stated under the title *'Justified Acts and Mistake'* as below:

> (190.028) *Acts by person bound by law to do it*. An offence is not committed when an act is done by a person who is bound by law to do it. For example, where A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law, A has committed no offence.
>
> This defence is often raised in the context of the 'superior orders' justification. The example above is quite clear cut in that, those obeying lawful orders are protected. However, where the orders are unlawful, the situation is different. Thus, using the example above, where the order of the soldier's superior officer is unlawful, the soldier is subject to penal consequences and the plea on acting on superior orders is not a defence, except where he can prove that because of a mistake of fact, he in good faith believed himself bound to obey. If the soldier knew that the order was unlawful but obeyed from fear of his life, he would need to establish the defence of duress

[40] In addition to the above literature and on the same issue, *Ratanlal & Dhirajlal's Law of Crime (24th Ed, 1997) pp 239-241* states:

> Obedience of an illegal order can only be used in mitigation of punishment but cannot be used as a complete defence.

[41] This court was also referred to another text book of *'Criminal Law in Singapore and Malaysia'* where one of the authors, CMV Clarkson wrote in chapter 8 entitled 'superior orders' at p 168:

> The soldier's position is this: the Penal Code does not recognize the mere duty of blind obedience to the commands of a superior as sufficient to protect a soldier from the penal consequences of his act. Difficult as the position may appear to be, the law requires that the soldier should exercise his own judgment and unless the actual circumstances are of such a character that he may have reasonably entertained that the order was one which he was bound to obey, he will be responsible like any other sane person for his act, although he may have committed it under the erroneous supposition that his superior was by law authorised to issue the order. His mistake in short must be a mistake entertained in good faith on a question of fact.

[42] It is clear, there was no defence of mistake of facts in this case. The respondent knew all the while that he was having problems justifying the purchases he made without the invoices. Even if his version of defence is true in

that he had discussed the matter with SP3 as his superior, and the suggestion put to SP3 that the respondent did give alternatives, it cannot be accepted that the respondent was under a mistake of fact or duress in following the said order.

[43] As stated by Raja Azlan Shah (as the late Royal Highness was then) in the case of *Lim Boon San v Public Prosecutor* [1968] 2 MLJ 45:

> It cannot be said that PW3 had under any circumstances to obey an unlawful orders of his superior. He is not that unintelligent enough to be able to distinguish between what is right and what was wrong. The same finding applies to the respondent in this case.

[44] This court found that the learned trial judge took a 360 degree turning after evaluating and accepting SP3's evidence at the close of the prosecution case. The learned trial judge chose to disbelieve SP3's evidence after hearing the defence of the respondent and SD2 at the defence stage.

[45] This court is mindful that the learned trial judge has the right to do so. But unfortunately, her appreciation of the defence version went against the weight of evidence produced by the prosecution. From the learned trial judge grounds of judgment it is clear that she had acted on her own believe, probabilities, impression and assumption. This court found that the modes taken by the learned trial judge were erroneous.

[46] At p 24 of the appeal record, the learned trial judge stated at the last para:

> Having considered the evidence of SP3, the court formed the impression that although he was vehement in his replies, he was less than forthright about what took place during the long period of time the vessel lay anchored in the waters of TL.

[47] This court found that the impression of the learned trial judge goes against the weight of evidence. The learned trial judge supported her impression with the fact that in some parts of SP3's evidence, he seemed to be uncertain with details and that perhaps he was briefed and informed with difficulty the respondent was facing during the conflict in Timor Leste. On this finding, the learned trial judge went straight to make a finding of a different fact, ie she did not believe SP3 when he said he had never instructed the respondent and his men to expeditiously make all purchases and that safety of the men were to be of the utmost concern. Those findings run contrary to the evidence of SP3 who had testified that he never gave any instructions for the respondent to obtain receipt by other means.

[48] At the same page, the learned trial judge went on further that she believed SP3 as the supreme officer on board the vessel and that everything that

went on board, off shore and whatever that concerned his men were always made known to him as captain of the ship. The learned trial judge further stated that it was only natural that one of the prime concerned for any self-respecting commanding officer is the safety of his men and his ship. On this score, the learned trial judge was firmly of the view that SP3 had given the instructions to the respondent before he left for the shopping expedition. This court found the learned trial judge had erred in making the findings based on her believe and she further erred in making a finding which was not relevant at all.

[49] The learned trial judge further acted on assumption where she stated in her grounds at p 25 of the appeal record:

> I accept there exists a chain of command throughout the length and breadth of the armed forces that every command given by the commanding officer is expected to be promptly obeyed. I accept that this is necessary to maintain discipline among the men. Based on this rationale I have no hesitation in believing that every relevant incident that occurred together with the day to day business for the smooth running of the ship would be reported to the commanding officer. Therefore I am sceptical when SP3 said the accused had never briefed him about the difficulty in preparing the documentations as there were no receipts to support the purchase. I am fortified in my decision for the main reason that this voyage was an important voyage not so much for the vessel and crew on board only but for the image and dignity of the nation. As commanding officer SP3 would have been kept informed of everything that went on.

[50] The above 'noble' assumptions made by the learned trial judge were contrary to the evidence of SP3. SP3 had testified and denied that he had given any instructions to the respondent to use the forged documents. The learned trial judge erred in facts and law by importing her personal knowledge to disbelieve SP3, instead of using the evidence before her. The error had occasioned the learned trial judge to make a wrong finding at the close of the defence case when she had done a maximum evaluation of the prosecution's case. This court finds that there are cogent reasons to interfere with the findings of the learned trial judge.

[51] *Ratanlal dan Dhirajlal's on Law of Crimes, (26th Ed) at p 2619* had stated:

> Where it was found that four forged receipts for the payment of rent, used by the accused, had been fabricated in lieu of genuine receipts which had been lost, it was held, with reference to the definitions of the terms 'dishonestly' and 'fraudulently' in sections 24 and 25, that the accused had not committed this offence, (reference was made to the case of *Sheo Dayal* (1885) 7 All 459). This case lays down bad law in view of several cases noted under sections 24 and 25. Where the accused gave forged receipts to his pleader and asked him to produce them in court in support of his defence to a suit, it was held that this amounted to using the receipts as genuine.

[52] In this case, SP7's evidence had proven that the invoices were issued. The respondent could, should and ought to have asked for the invoices from Landmark Trading but he has chosen not to. Alternatively the respondent could have resorted to prepare a memo or telex to justify the purchases without the invoices if truly the situation in Timor Leste at the material time had hindered him to do so, but he again, chose not to. He testified that he did discuss with SP3 and even if SP3 had given such instruction as alleged by the respondent, it could be gleaned from the facts and circumstances that the respondent was in a position to disregard the order for there are other methods or alternatives of justification. Instead and this time, he chose to blame SP3.

[53] Further, the learned trial judge had also stated that she was of the view that there was a high probability that the respondent, SD2 and SD3 had discussed ways to resolve the problem. Even if SP3 was found grudgingly admitting that the discussion might have taken place, nothing came out from SP3's evidence that he did give instructions to the respondent to obtain the invoices from other means. The learned trial judge justified and chose to believe SD2 and SD3 as she had found them to be believable, credible and reliable as they were said to give their evidence in an impartial manner. The learned trial judge further enhanced her findings on SD2 and SD3's credibility with the fact they have given their services to the navy for more than 20 years and were therefore in a position to have the necessary knowledge and experience of what was the norm in the navy. If the later, was the criteria in assessing their credibility then SP3 had also served the navy for a long time.

[54] This court was of the view that the learned trial judge cannot act on probability. Her justification cannot negate the crux of the offence committed by the respondent ie he knew the documents were forged documents and that he had used them dishonestly.

[55] The learned trial judge further stated at p 26:

> Even if the above decision were to be found to be erroneous, I would without any hesitation state from the evidence given by the accused when considering the circumstances surrounding the journey to Timor Leste that the prosecution had failed to prove that the accused had the necessary intention to use the forged invoices to dishonestly make the claims. In my view there was no active mens rea on the part of the accused to cheat anybody or to make a false claim using the two forged invoices.

[56] Again, this court found the above justification by the learned trial judge goes against the weight of evidence. The respondent could not be said to have no active mens rea when he obviously took a very active part in instructing SP1, SP2 and SP4 to prepare the forged invoices. He took the trouble to instruct his officers to make the forged Landmark Trading stamp in Surabaya. He signed

the forged invoices and submitted them to the relevant authority. SP7 stated that invoices were issued after the delivery of the goods. All these had been and could be elicited from evidence produced by the prosecution. They are not probabilities or beliefs or assumptions. They are all core evidence to show that the respondent had the dishonest intention to use the forged documents as genuine.

[57] Even if there were no specific instructions or directives to cater to the emergency situation in Timor Leste, the court finds that the evidence of SP8 provides for a method of justification for purchases without invoices. This court disagrees with the findings of the learned trial judge when she stated that in a situation like Timor Leste, where invoices were difficult to obtain, it involves creativity and initiative in finding ways and means to find fresh rations to feed all the crew on the vessel. True, but when the respondent chose to use forged documents as genuine, that cannot be treated as being creative. Being creative in this case has nothing to do with the offence committed by the respondent. Creativity is definitely not a defence in this case. It cannot be a valid reason to justify the dishonesty on the part of the respondent.

[58] The perplexity in the findings made by the learned trial judge is enhanced by the fact that after believing SP3 could have given the instructions to the respondent to use the forged invoices, the learned trial judge at p 27 of the appeal record found that the consent given by SP3 was an implicit consent. These two terms ('could have' and 'implicitly') are inconsistent with the evidence of SP3. It cannot be accepted to have raised reasonable doubt on the prosecution's case for an offence under s 471 of the Penal Code.

[59] In the upshot, the defence forwarded by the respondent in putting the blame on SP3 has failed to raise a reasonable doubt on all the elements of the offence under s 471 of the Penal Code. The respondent's defence that he had done his level best to justify the purchases of food supply could not be sustained based on the evidence produced during the trial.

[60] For reasons stated above, the appeal is allowed and the order given by the learned trial judge in discharging and acquitting the respondent is set aside. This court found the respondent guilty on both charges preferred against him. This court took into account the public interest and had balanced them with the mitigation of the respondent who had taken the task to ensure the food supply were sufficient for all the crews on board the vessel of KD Mahawangsa during the material time. This court is of the view that the sentence of imprisonment of one year for each charges are appropriate and adequate. The sentences are to run concurrently from the date of the decision of this court.

Appeal allowed, decision of the trial court set aside, respondent found guilty on both charges and sentenced to a year's jail on each charge.

Reported by Ashok Kumar